



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of:

Milwaukee County Department of Human Services, Petitioner

**REHEARING**

vs.

**DECISION**

██████████ Respondent

Case #: FOF - 170479

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**PRELIMINARY RECITALS**

Pursuant to petition filed December 3, 2015, under Wis. Admin. Code § HA 3.03 (February 2013), and 7 C.F.R. § 273.16 (2014), to review a decision by the Milwaukee County Department of Human Services ["County"] to disqualify ██████████ from receiving FoodShare benefits ["FS"] for a period of one year, a Hearing was scheduled for January 11, 2016. Respondent failed to appear for that January 11<sup>th</sup> Hearing. A *Decision* dated January 29, 2016 was issued finding that Respondent committed an Intentional Program Violation ["IPV"] in the Food Stamp ["FS"] program.

On March 2, 2016 the Division of Hearings and Appeals ["DHA"] received, via U.S. Mail postmarked February 29, 2016, a letter from Respondent dated February 24, 2016. DHA treated that letter as a request for a rehearing. DHA sent a letter dated March 4, 2016 to Respondent requesting additional information. On March 15, 2016 DHA received, via U.S. Priority Mail postmarked March 14, 2016, a letter from Respondent dated March 12, 2016 with the requested additional information. By a *Rehearing Request Order* dated March 17, 2016 DHA GRANTED Respondent's request for a rehearing. A rehearing was held on May 24, 2016 via telephone from Madison, Wisconsin. At Respondent's request rehearsals scheduled for April 26, 2016 and April 5, 2016 were rescheduled.

The issue for determination is whether Respondent committed an Intentional Program Violation ["IPV"].

There appeared at that time via telephone the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

BY: ██████████ Income Maintenance ["IM"] Specialist Advanced

Milwaukee Enrollment Services  
1220 W. Vliet Street  
Milwaukee, Wisconsin 53205

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

ADMINISTRATIVE LAW JUDGE:  
Sean Maloney  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Respondent (CARES # [REDACTED]) is a resident of Wisconsin who received FS benefits in Wisconsin in March 2012 and in August 2012.
2. Due to Respondent's enrollment in the FS program, Respondent was issued a QUEST card which Respondent utilized to access her monthly FS allotment provided to Respondent. QUEST cards are electronic benefit transfer cards that replaced FS coupon booklets. Exhibit A.
3. Respondent's QUEST card was utilized in a transaction involving [REDACTED] [REDACTED] ["JHD"]. Exhibit A.
4. JHD was a licensed vendor of the United States Department of Agriculture ["USDA"] Food and Nutrition Service ["FNS"], which enabled it to redeem QUEST cards. Exhibit A.
5. JHD was classified as a mobile vendor and operated out of private vehicles. Between August 2010 and January 2013, JHD redeemed approximately \$778,000 in QUEST benefits from FS benefit recipients who were not purchasing food, but instead receiving cash for providing access to their QUEST benefits. Exhibit A.
6. On or about February 15, 2013, [REDACTED] [REDACTED] ["JSW"], doing business as JHD, pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. [REDACTED] [REDACTED] admitted that no food or groceries were ever provided by [REDACTED] and/or JHD in exchange for FS benefits. *United States of America v. [REDACTED] [REDACTED]*, Case No. 13-CR-12 (E.D. Wis. February 15, 2013). Exhibit A.
7. On December 11, 2016, the petitioner prepared an *Administrative Disqualification Hearing Notice* alleging that on 2 occasions (1 in March 2012 and another in August 2012) Respondent intentionally transferred FS benefits to JHD in the total amount of \$300 in exchange for cash payment. Exhibit A.

### **DISCUSSION**

An IPV consists of having intentionally:

“(1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).” 7 C.F.R. § 273.16(c) (2014); See also, *FoodShare Wisconsin Handbook*, [“FWH”] § 3.14.1; *Income Maintenance Manual*, [“IMM”] Chapter 13.

“*Trafficking* means:

(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;

(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

(6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

7 C.F.R. § 271.2 (2014); FWH § 3.14.1. (*italics* in original).

Wisconsin statutes provide, in the parts relevant here, as follows:

“(a) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.

- (b)** No person may knowingly fail to report changes in income, assets or other facts as required under 7 USC 2015 (c) (1) or regulations issued under that provision.
- (c)** No person may knowingly issue food stamp program benefits to a person who is not an eligible person or knowingly issue food stamp program benefits to an eligible person in excess of the amount for which the person's household is eligible.
- (d)** No eligible person may knowingly transfer food stamp program benefits except to purchase food from a supplier or knowingly obtain or use food stamp program benefits for which the person's household is not eligible.
- (e)** No supplier may knowingly obtain food stamp program benefits except as payment for food or knowingly obtain food stamp program benefits from a person who is not an eligible person.
- (f)** No unauthorized person may knowingly obtain, possess, transfer, or use food stamp program benefits.
- (g)** No person may knowingly traffic food stamp program benefits.”

Wis. Stat. § 946.92(2) (2013-14).

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. 7 C.F.R. §§ 273.16(b)(1), (11) & (12) (2014).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and, 2) intended to commit an intentional program violation per 7 C.F.R. § 273.16(e)(6) (2014).

*Clear and convincing evidence* is an intermediate standard of proof which is more than the *preponderance of the evidence* used in most civil cases and less than the *beyond a reasonable doubt* standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. “[T]his level of proof, ‘or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud . . . .’” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990). While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations.

There is no litmus test to show the trier of facts when properly admitted evidence is of a sufficient degree to be clear and convincing. The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

“Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory

to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.” *Kuehn*, 11 Wis.2d at 26.

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

Recently, the Wisconsin Supreme Court has clarified that “[i]f a party must prove its case by clear and convincing evidence ‘[a] mere preponderance of the evidence is not sufficient.’ [citation omitted]. This is particularly true when the burden of proof has due process implications. [citation omitted].” *Matter of Mental Commitment of Melaine L.*, 2013 WI 67 ¶ 88, n. 25, 349 Wis. 2d 148, 187-188, n. 25, 833 N.W.2d 607.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Respondent testified convincingly that she was “not aware of any of this.” She testified that she sent her children to the store and they knew her Personal Identification Number [“PIN”] for her FS card.

Based upon the record before me, I find that Petitioner has failed to establish by clear and convincing evidence that Respondent intentionally violated FS program rules. Therefore, Petitioner may not disqualify Respondent from the FS program.

### **CONCLUSIONS OF LAW**

For the reason discussed above, the IPV in this matter cannot be sustained and must be reversed.

**NOW, THEREFORE**, it is

### **ORDERED**

That the IPV in this matter is REVERSED and that DHS and OIG not impose an IPV 1 year period of FS ineligibility on Respondent.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

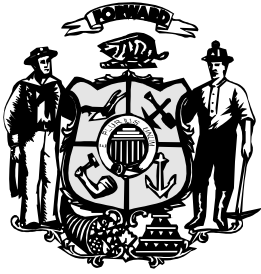
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 2nd day of June, 2016

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\sSean Maloney  
Administrative Law Judge  
Division of Hearings and Appeals

c: Miles - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on June 2, 2016.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@dhs.wisconsin.gov